Office-Supreme Court, U.S.
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No. 82-1643

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

INTERSTATE COMMERCE COMMISSION, *et al.*,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF ABERDEEN AND ROCKFISH RAILROAD COMPANY, *ET AL.*, AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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November 1983

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QUESTION PRESENTED

Whether the Interstate Commerce Commission has authority to nullify fully effective common-carrier rate tariffs by "rejecting" them retroactively and thereby obligate carriers to refund to shippers transportation charges collected under such tariffs, wholly without regard to whether the shippers have suffered any actual harm.

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BRIEF OF ABERDEEN AND ROCKFISH RAILROAD COMPANY, *ET AL.*, AS *AMICI CURIAE* SUPPORTING RESPONDENTS

This brief as *amici curiae* in support of respondents is filed by the railroads of the United States listed in Appendix A to the petition for a writ of certiorari that currently is pending before the Court in No. 82-707. Amici have received and filed with the Clerk of the Court letters from counsel for petitioners and respondents consenting to the filing of this brief.

INTEREST OF AMICI

Amici, which include the principal railroads of the United States, have a direct interest in sustaining the decision below by the Eleventh Circuit. The decision holds that the Interstate Commerce Commission does not have authority under the Interstate Commerce Act ("the Act") to "reject" *effective*

common-carrier tariffs and thus impose private penalties on such carriers without regard to whether shippers have suffered any harm.

Although the railroads are not subject to the motor carrier rate bureau rules that give rise to this case, the railroads—as well as motor carriers—are subject to *another* set of recent rules relating to tariffs. In those new rules, the Commission has (as in this case) claimed power to nullify carrier tariff rates after they have become effective—in that instance, merely for failure to comply with a technical tariff filing formality. See p. 7, below. On review, the Fifth Circuit—in conflict with the Eleventh Circuit in this case—rejected the railroads' challenge to the tariff rules and held that the Commission may nullify effective tariff rates. See *Aberdeen & R.R.R.* v. *United States*, 682 F.2d 1092 (5th Cir. 1982). That decision is now pending before the Court on a petition for writ of certiorari filed by amici.[1]

The Commission's claim of power to nullify effective tariff rates has enormous practical significance for the railroads. Each year, carriers file and place into effect thousands of tariff changes. For decades past, it has been understood that a tariff, once effective, is binding on carrier and shipper alike. See p. 14, below. If the Commission may now nullify transportation rates by striking effective common-carrier tariffs, carriers will be exposed to a vast new refund liability unrelated either to the reasonableness of the rates charged or to any harm suffered by shippers. See pp. 10-11, below. This course was never authorized by Congress, is unnecessary to the enforcement of the Act, and is patently unfair.

STATEMENT

Each year common carriers file and publish thousands of tariffs setting forth new and changed rates for transportation

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[1] See petition in No. 82-707. See also petition of various motor carrier rate bureaus in No. 82-804.

services. This case involves an attempt by the Interstate Commerce Commission to assert a new, discretionary authority to penalize carriers by nullifying their tariffs after they have become effective. Such nullification could render financially hard-pressed carriers liable to refund millions of dollars in tariff charges based on rates that are concededly reasonable.

A. The Statutory Plan Applicable to Common-Carrier Tariffs

One of the central requirements of the Interstate Commerce Act is that common carriers subject to ICC authority may provide regulated services only pursuant to tariffs filed with the Commission.[2] Carriers are specifically forbidden to provide such service in the absence of tariffs and "may not charge or receive a different compensation" than the rate specified in the filed tariff. Section 10761(a). By requiring filed tariffs and strict compliance with them, the Act seeks to avoid unjust discrimination and to give shippers an advance opportunity to challenge proposed rates. To achieve this protection for shippers, while taking account of the interests of carriers, the Act provides a carefully balanced set of explicit procedures, remedies, and penalties.

Chronologically, the first step in fixing a new rate, or changing an existing one, occurs when the carrier files with the Commission a new tariff, which may not take effect until a specified advance notice period has elapsed. Section 10762(a),(c). The same section that governs tariff filings provides that the Commission may reject such a "submitted" tariff if the tariff "violates this section or regulation of the Commission carrying out this section." Section 10762(e). Historically, this tariff rejection authority has been understood as a peremptory power on the part of the Commission to reject

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[2] 49 U.S.C. § 10761(a) (Supp. V, 1981). Hereafter, all references to sections are to the current version of the Interstate Commerce Act printed in Supp. V, unless otherwise indicated.

tariffs filed with it, *before* they become effective, when the Commission notices in the tariff a defect so patent as to make it pointless to consider the tariff under the Act's more detailed provisions.

If the Commission accepts the tariff for filing, the next step under statutory plan allows the Commission to suspend the effectiveness of the new tariff—before it becomes effective—for a limited period of months and to commence an investigation into its lawfulness. Section 10707. If the Commission pursues this course, it can also require the carriers to "keep account" of the revenues collected and to make refunds if the tariffs are ultimately found unlawful. *Id.* The suspension period is limited, however, to a specified maximum after which the tariff goes into effect automatically if the Commission has not completed its inquiry. *Id.* At the end of the investigation, the Commission can also prescribe new rates for the future if the filed tariff is found to be unlawful. Section 10704.

Finally, if the tariff is filed by the carrier and is neither rejected in advance (under Section 10762(e)) nor subjected to suspension and investigation (under Section 10707), it goes into effect. But the shipper may file at any time a complaint that the Commission must decide on the merits. Section 11701(b). In such a complaint proceeding, the carrier may be held liable for "overcharge" liability if it has collected from the shipper more than the rate set forth in the published tariff. Section 11705(b)(1). Alternatively, liability may be imposed under Section 10705(b)(2) and (b)(3) for "damages" if the carrier has collected the published tariff rate but that rate is unlawful under the substantive standards of the Act (*e.g.*, because it is unreasonably high).[3]

The Act also includes an array of specific civil and criminal penalties designed to punish carriers for violations of the Act's

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[3] In such a proceeding, the Commission may also use its prescription power and order adjustment in the tariff rate for the future, if the existing rate is found to be unlawful. See Section 10704.

provisions. Sections 11901, *et seq.* These penalty provisions include not only specific sanctions for such unlawful conduct as the payment of rate rebates (Sections 11902, 11904) and attempted evasion of regulation (Section 11906), but also general sanctions for willful violation of any provision of the Act or any Commission regulation or order.[4] The Act makes no provision, however, for *private* penalties—that is, penalties payable to shippers or other private parties without regard to harm.

B. The Present Controversy

In the past, the Commission maintained a staff of tariff examiners to review each new tariff sheet prior to its effective date. If some patent defect of form or substance was discovered, the Commission usually rejected the tariff *before* it took effect. Under this procedure, the carrier could ordinarily file a corrected tariff without suffering any significant adverse effect.

When some defect was discovered only *after* a tariff had taken effect, the Commission followed various courses depending on the nature and significance of the defect. If the error was merely clerical or typographical, the Commission advised the carrier of the error so that a corrected tariff could be filed and published; if the defect was substantive in character, the Commission could initiate a proceeding to examine the rate's lawfulness under Section 10704. In all events, the Commission did *not* attempt to reject or otherwise nullify effective common-carrier tariffs that were found to be defective.

Recently, however, the Commission has reduced its tariff examination staff and curtailed its review of tariff filings.[5] In place of its traditional tariff review process, the Commission

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[4] See, *e.g.*, Section 11914(a) (fine prescribed for each day a rail carrier violation continues); Section 11914(b) (fine prescribed for each day a motor carrier violation continues).

[5] The Commission now examines only the title page of each proposed tariff for violations of tariff publishing requirements.

has decided that it should exercise a newly invented authority to "impose sanctions" for defective tariff filings. See Pet. Br. 23-24 n.24. Such "sanctions" involve the selective, administrative nullification of tariffs even after they have taken effect. Through such nullification of tariffs, the Commission intends to render carriers liable to shippers for "overcharges," even though the shippers paid no more than the rate clearly set forth in the tariff in effect at the time that their goods moved. See Pet. Br. 7-8.[6]

The Commission's purported source of this tariff nullification power is not Section 10704 of the Act, providing for determinations of the lawfulness of existing tariff rates, or any of the Act's numerous explicit penalty provisions. It is rather the portion of Section 10762—which deals generally with the filing and the publication of tariffs—authorizing the "rejection" of newly submitted tariffs. Section 10762(e). Although nothing in Section 10762 says anything concerning hearing procedures or resort to administrative boards, the Commission has also sought to create an entire administrative system, including an employee board, to implement its newly claimed nullification authority.[7]

This case involves one of two different contexts in which the Commission has sought to assert such authority. In December 1980, the Commission adopted rules under Section 14 of the Motor Carrier Act of 1980, which revised the Interstate Commerce Act's provisions governing motor carrier rate bureaus. Pet. App. 32a-79a.[8] In these new rules, the Commission stated

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[6] The Commission's theory for what is actually a penalty is that the tariff should be treated as non-existent *ab initio*, even though it was physically on file, shippers knew of it, and freight moved under it.

[7] See generally *Tariff Integrity Board*, 44 Fed. Reg. 58511 (1979), *modified in part*, 367 I.C.C. 389 (1980), *rev'd*, *Southern Motor Carriers Rate Conf., Inc.* v. *United States*, 676 F.2d 1374 (11th Cir. 1982).

[8] Pub. L. No. 96-296, § 14, 94 Stat. 803 (codified at 49 U.S.C. § 10706(b)).

that it would use its alleged Section 10762(e) authority to strike and thereby nullify effective tariffs that had been adopted in violation of rate bureau agreements. Pet. App. 66a, 68a.[9]

The Commission also has asserted its purported authority to reject effective common-carrier tariffs in an entirely different context that directly concerns the railroads. Specifically, the Commission has issued a complex and detailed set of regulations governing the publication of tariffs.[10] Certain rules require all new tariff sheets to bear symbols indicating whether the new tariff increases, decreases or involves no change in the existing rate. See 49 C.F.R. §§ 1300.2(a), 1310.10(f)(1).[11] Given the thousands of new tariff filings annually, inadvertent errors in symbolization occasionally do occur, and in the past such errors have been corrected without rejecting an already effective tariff rate.

However, in its new regulations, the Commission has declared that *any* missymbolized tariff rate increase is invalid, even if the increase has already taken effect. The agency asserts that the effective rate shall be that specified by the tariff "purportedly superseded," thus giving rise to overcharge liability to affected shippers. See *Tariff Improvement*, 364 I.C.C. 217 (1980).[12] The Commission has expressly ac-

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[9] The Commission has indicated that it intends to use some form of complaint and hearing procedures to consider allegations of rate bureau violations. Pet. App. 68a, 78a, 90a.

[10] These regulations cover more than eighty pages of the Code of Federal Regulations in the case of motor carrier tariffs and more than seventy pages in the case of rail carrier tariffs. See 49 C.F.R. §§ 1300.00-.200, 1307.00-.202.

[11] For example, an increase must be marked with a diamond symbol or "(R)" and a decrease with a teardrop symbol or "(A)". See 49 C.F.R. §§ 1300.2, 1310.10(f)(1).

[12] The Commission's order adopting these new rules was sustained in *Aberdeen & R.R.R.* v. *United States*, 682 F.2d 1092 (5th Cir. 1982), *petitions for cert. pending* (Nos. 82-707, 82-804).

knowledged that such rejection of effective tariffs represents "a departure from numerous Commission and court decisions in the past."[13]

C. The Decision Below

A number of motor carrier rate bureaus sought review in the Eleventh Circuit of the ICC's December 1980 rate bureau rules, challenging, *inter alia*, the Commission's authority to reject and thus nullify effective tariff rates. The Court of Appeals agreed with the carriers, observing that Section 10762(e) enables the Commission to dispose summarily of *proposed* tariffs that contain "obvious defects." Pet. App. 27a-28a.

The Eleventh Circuit held that, once tariff rates become effective, there is no power to reject retroactively, noting that the Commission has other statutory procedures for dealing with effective tariff rates found to be unlawful after investigation and hearing, "including prescribing the proper rates and awarding damages for violation of the Act." Pet. App. 27a. In addition, the court stressed the extreme consequences of Commission rejection of an effective tariff—namely, the possibility of "overcharge" liability based solely on the earlier superseded tariff rate. Pet. App. 28a. The court also relied on the existence of "consistent Commission decisions" as well as pertinent precedent of this Court. Pet. App. 31a.[14]

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[13] See 44 Fed. Reg. 60123 (1979). The Commission has said it will apply the rejection power on a "case-by-case basis" and "automatic liability for overcharges" will not result "every time it is determined that [an] increase was improperly symbolized." *Tariff Improvement, Ex Parte No. 370* (ICC, Dec. 29, 1982). However, no standards for the exercise of this claimed discretionary power appear in the Commission's rules, much less in the Act.

[14] In an earlier decision reviewing new ICC tariff rules, the Eleventh Circuit similarly concluded that the Commission does not have authority to reject or strike effective carrier tariffs. See *Southern Motor Carriers Rate Conf., Inc.* v. *United States*, 676 F.2d 1374 (1982). The Government did not seek review of that decision.

In the Fifth Circuit, the railroads challenged the Commission's counterpart claim of authority to reject and nullify mis-symbolized tariffs even after they had become effective. The Fifth Circuit sustained the Commission, in direct conflict with the Eleventh Circuit. See *Aberdeen & R.R.R.* v. *United States*, *supra*. This Court granted the Government's certiorari petition to review the Eleventh Circuit's present decision and has deferred action on other certiorari petitions raising the same "rejection" power issue, including the railroads' petition to review the Fifth Circuit decision.

SUMMARY OF ARGUMENT

The issue in this case is whether, in addition to the explicit remedies and penalties provided in the Act, the Commission can reject retroactively effective common-carrier tariffs. This step would render carriers liable to refund transportation charges to shippers who suffered no actual harm. The Commission claims that this "administrative sanction" is necessary to implement the Motor Carrier Act of 1980 and that such a sanction "is not foreclosed by the Act." Pet. Br. 14, 23. In a companion case, the agency asserts the same "rejection" power to penalize rail carriers for tariff symbolization errors. See p. 7, above.

The Commission's claim of power to reject and nullify effective carrier tariffs is at odds with controlling decisions of this Court that have governed the Act's administration for decades; it is at odds with nearly uniform ICC practice for over fifty years; it is at odds with not only the decision below by the Eleventh Circuit but also recent decisions of the First and District of Columbia Circuits; and it is at odds with the structure and the history of the Act itself. Indeed, the legislative history, while intricate and requiring careful reading (see pp. 14-20, below), clearly confirms that Congress has *not* given the ICC discretionary authority to nullify effective tariff rates.

Furthermore, the Commission has no need for the tariff nullification power it now seeks to create. The Act's detailed system of remedies and penalties ensures that shippers may be

made whole for any harm from unlawful tariffs and amply deters deliberate unlawful action by carriers. The expanded and unbridled power sought by the Commission here would allow it to impose on carriers multi-million dollar *private* penalties that would constitute a windfall for shippers—a result squarely at odds with decisions of this Court holding that such private penalties are not proper under the Act.

ARGUMENT

I. Both the Act's Structure and Its Governing Principles Show That the ICC Cannot Nullify Effective Tariffs.

1. Congress, in regulating carriers, enacted a carefully integrated and complete system of procedures, remedies and penalties. See pp. 3-5, above. This Court has repeatedly said that the statutory plan must be respected by courts and the agency alike, and it has forbidden the use of implied or invented remedies that might disturb Congress' careful balance between carrier and shipper interests.[15] In this case, the Commission's present claim to authority to reject effective tariffs is fundamentally at odds with the statute.

The Act imposes on carriers two explicit forms of liability—damage liability (Section 11705(b)(2), (3)) and overcharge liability (Section 11705(b)(1)). Damages serve to make a shipper whole for any actual injury that he has suffered;[16] overcharges have similarly served in the past to make a shipper whole when he has been charged more than the existing, effective tariff rate.[17] The nullification liability that the Com-

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[15] *Consolidated Rail Corp.* v. *National Ass'n of Recycling Industries, Inc.*, 449 U.S. 609, 612 (1981); *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 441 U.S. 444, 456-59 (1979); *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658, 662-67 (1963).

[16] See, *e.g.*, *Spencer Plant Foods, Inc.* v. *Atlantic C.L.R.R.*, 302 I.C.C. 799, 800 (1958); *Boren-Stewart Company* v. *Atchison, T. & S.F. Ry.*, 196 I.C.C. 120, 125-26 (1933).

[17] See, *e.g.*, *Hamilton* v. *Pennsylvania R.R.*, 45 I.C.C. 191 (1917); *Charles Boldt Co.* v. *Pittsburg, C.C. & St.L. Ry.*, 42 I.C.C. 308 (1916).

mission now seeks to impose would bear no relationship either to any harm suffered by shippers or to the existing tariff rate.

For example, assume that the railroads inadvertently missymbolized a 5 percent increase in railroad rates, representing nothing more than a pass-through of increased operating costs. Under the new regulations, the Commission could seek to require the railroads to refund this entire amount, which could easily total millions of dollars in a single year.[18] Yet the railroads would have incurred the increased costs, the tariffs (though missymbolized) would have clearly set forth the 5 percent increase, and the shippers would have paid only reasonable rates and suffered no harm from the missymbolization.[19]

There is nothing whatever in the language of the Act that specifically permits the rejection of *effective* tariffs. There is nothing in the Act that provides for imposing private penalties by awarding refunds to shippers who have been charged the published tariff rate and who suffer no demonstrated harm. To "imply" from the Act authority for the bizarre nullification and refund sanction invented by the Commission is doubly unwarranted. For here Congress has provided explicit and rational remedies under Section 11705 for shippers harmed by violations of the Act.

2. The Commission's action is also in conflict with principles that have governed the interpretation of the Act since its inception. Just as the ICC's claim of authority cannot be

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[18] In the past, a misplaced comma in the publication of major rate increases produced refund claims totalling $4.5 million and estimated potential liability of approximately $25 million. See *Petition for a Declaratory Order—Inclusion of Interstate Application of Authorized General Rate Increases*, 359 I.C.C. 295, 302 n. 7 (1979).

[19] A corrected tariff might be filed for the future, but the Act does not provide a mechanism for retroactive rate increases in the case of defective tariffs. Cf. *Southern Motor Carriers Rate Conf., Inc.* v. *United States*, *supra*, 676 F.2d at 1378.

squared with the Act's language and structure, so too the claim conflicts with settled principles reflected in decisions of this Court.

In one of its earliest decisions under the Act, this Court said that "before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury." *Parsons* v. *Chicago & N.W. Ry.*, 167 U.S. 447, 460 (1897). Even for an admitted violation of the Act's substantive provisions, a shipper is not entitled to a refund "without other proof of actual damage." *Davis* v. *Portland Seed Co.*, 246 U.S. 403, 415 (1924).[20] As this Court explained in *Pennsylvania R.R.* v. *International Coal Mining Co.*, 230 U.S. 184, 200 (1913), Congress did not intend to enable "persons not injured" to recover any "penalty" under the Act, "in addition to the penalty payable to the Government."[21]

Congress established clear and specific limits on the fines and other penalties that may be imposed on carriers under the various express penalty provisions set forth in the Act. See Section 11901, *et seq.* Despite such precision, the Commission contends that Congress, in the single bland sentence of Section 10762(e), has conferred upon it undefined and apparently unlimited discretion to impose on carriers sanctions that could be

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[20] Accord, *e.g.*, *ICC* v. *United States*, 289 U.S. 385, 389-93 (1933); *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156, 164-65 (1922); *Pennsylvania R.R.* v. *International Coal Mining Co.*, 230 U.S. 184, 204-206 (1913).

[21] In *Pennsylvania R.R.*, the Court clearly articulated the distinction made in the Act between private injury and public wrong:

> "The limitation of liability to the persons damaged and to an amount equal to the injury suffered is not out of consideration for the carrier who has violated the statute. On the contrary, the act imposes heavy penalties. . . . But for the public wrong and for interference with the equal current of commerce these penalties or fines were made payable to the Government. If by the same act a private injury was inflicted a private right of action was given." 230 U.S. at 206.

vastly greater (see p. 11, above) than any conceivable fine under the Act.[22] Given the principles that have guided the Act's interpretation in the past, such a construction simply is implausible.

These principles cannot be overcome by general assertions that the power to reject effective tariffs would be useful to the Commission. The Commission has no legitimate need for authority to nullify effective carrier tariffs. If a shipper suffers injury because of either a technically defective tariff or a tariff that violates a substantive Commission rule (such as a motor carrier rate bureau rule), a damage remedy is available to make the shipper whole. See p. 4, above. And if a carrier willfully violates either the Act or the Commission's rules, specific penalties are provided. See pp. 4-5, above.[23]

Should the Commission require further authority to enforce the Act, it is free to seek such authority from Congress. But it is difficult to imagine anything more lame than a claim that the

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[22] Although the Commission asserts that it will use its "discretion" in imposing such penalties, neither the Act nor the Commission's rules provide any guidelines for exercising such discretion. The very claim that the Commission has such a sweeping latitude of discretion to impose multimillion-dollar penalties underscores the extraordinary character of the power it claims. Even for punishing a Sherman Act felony, a federal court is limited to a fine of $1 million in the case of a corporation, an amount that the Commission could easily exceed through retroactive rejection of a tariff rate increase. See p. 11 n. 18, above.

[23] Against this array of remedies and penalties expressly provided under the Act, it is sophistry for the Commission to suggest (Pet. Br. at 11, 22) that, unless it can punish motor carriers by nullifying effective tariffs, such carriers will seek to place into effect tariffs that violate motor carrier rate bureau agreements and will be able to retain "the fruits" of such violations. Moreover, apart from the Act itself, the risk of antitrust liability is certainly a powerful deterrent to any possibly anticompetitive ratemaking activities not in compliance with an approved rate bureau agreement.

existing combination of remedies and penalties under the Act is inadequate. Still less can one imagine Congress' granting a remedy of the type invented by the Commission in this case, providing multimillion-dollar windfalls to shippers at the whim of the agency.

II. The Act's History Confirms That Congress Did Not Intend to Authorize the ICC to Nullify Effective Tariffs.

1. Prior to 1935, there was no reference in the Act to *any* general rejection power,[24] and it was well established that an effective tariff could not be treated as a nullity. In fact, from virtually the outset of regulation in 1887, a fundamental purpose of the Interstate Commerce Act's common-carrier provisions has been "to secure uniformity of treatment to all, to supress unjust discriminations and undue preferences, and to prevent special and secret agreements, in respect of rates for interstate transportation."[25] To accomplish this purpose, the Act required that carriers file tariffs and strictly observe them until changed by new tariff filings.[26] Consistent with this requirement, the Court has repeatedly held that a filed and effective tariff sets forth the rate binding on carrier and shipper alike.[27]

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[24] In 1910, the Commission was given limited authority to reject rail-carrier tariffs that did not "give lawful notice" of their "effective date"—a provision phrased in terms that clearly referred solely to rejection of tariffs not yet effective. See p. 16, below.

[25] *Kansas C.S. Ry.* v. *C.H. Albers Comm'n Co.*, 223 U.S. 573, 597 (1912); accord, *e.g.*, *Armour Packing Co.* v. *United States*, 209 U.S. 56, 72 (1908); *New York, N.H. & H. R.R.* v. *ICC*, 200 U.S. 361, 391 (1906).

[26] See Section 10762(a) (formerly 49 U.S.C. §§ 6(1), 317(a), 318(a)); Section 10761(a) (formerly 49 U.S.C. §§ 6(7), 317(b), 318(a)). See also, *e.g.*, *Louisville & N. R.R.* v. *Mottley*, 219 U.S. 467, 476 (1911).

[27] See, *e.g.*, *Crancer* v. *Lowden*, 315 U.S. 631, 635-36 (1942); *Ballwin* v. *Milling Co.*, 307 U.S. 478, 484-85 (1939); *Davis* v. *Henderson*, 266 U.S. 92, 93 (1924); *George N. Pierce Co.* v. *Wells, Fargo & Co.*, 236 U.S. 278, 285 (1915); *Boston & M.R.R.* v. *Hooker*, 233 U.S. 97, 121 (1914).

For decades it has been the law that, so long as a shipper pays no more than the rate stated in an effective tariff, he is entitled to recover only for actual *harm* resulting from a violation of the Act or a Commission rule or order. This Court made clear very early that a tariff accepted for filing may not be treated as a nullity, either because of some procedural defect in the filing or because of some substantive unlawfulness in the tariff rate. Thus, in *Berwind-White Coal Mining Co.* v. *Chicago & E.R.R.*, 235 U.S. 371 (1914), the Court refused to permit a shipper to escape liability for demurrage charges on the theory that the tariff prescribing such charges was non-existent, even though the Court assumed *arguendo* that the Act's tariff filing formalities had not been strictly met. The Court emphasized that the tariff documents had been "received and placed on file by the Commission." *Id.* at 375.

Similarly, in *Davis* v. *Portland Seed Co.*, *supra*, a shipper contended that the tariff rate charged him—which admittedly was unlawful because it violated the Act's long-haul short-haul provision—should be treated as "non-existent" and that he should be allowed to recover on the basis of the lower rate charged favored shippers. The Court explicitly rejected the notion that a filed and effective tariff could be treated as "non-existent" (264 U.S. at 416, 422), holding that the shipper was entitled to recover only any actual damages he had suffered (*e.g.*, due to loss of business). See also *Texas & P. Ry.* v. *Cisco Oil Mill*, 204 U.S. 449 (1907) (filed and effective tariff could not be treated as a nullity because of alleged failure to comply with requirements that tariff be posted for public inspection).

This long-established principle that a filed and effective tariff may not be treated as a nullity contributes to the Act's goals of promoting certainty and protecting reliance on the filed tariff rates. Goods are shipped, revenues are collected, and business plans are formulated in reliance on established and effective rates. Carriers also have proceeded on the premise that tariff rates, if not unreasonably high, may be retained by them and are not liable to be repaid based on some

typographical flaw in the tariff or other defect unrelated to the substance of the rate. Indeed, it is impossible to see how any planning could reliably be done by carriers, already hard-pressed financially, in the face of the vast and uncertain liability now made possible by the Commission.[28]

Within this context, the ICC early in the history of the Act was given authority to reject a rail-carrier tariff "tendered for filing" that did not "give lawful notice of its effective date."[29] And, even without any broader statutory grant, the Commission proceeded to reject tariff filings that were patently defective in other respects—that is, returned them *before* they became effective.[30] But in none of these early tariff rejection decisions did the Commission assert, much less decide, that it could retroactively nullify effective common-carrier tariffs, thereby upsetting the settled expectations of affected carriers and shippers. See pp. 21-24, below.

2. In establishing motor carrier regulation, Congress did not confer any new authority to nullify effective tariffs. In 1935, Congress passed the original Motor Carrier Act, adding to the Interstate Commerce Act a new part concerning motor carrier regulation. See Act of Aug. 9, 1935, ch. 498, 49 Stat. 543. One of the provisions, modelled on railroad regulation, required motor common carriers to file tariffs, and the Commission was authorized to prescribe "the form and manner" of

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[28] In a decision released in August 1983, the Commission found that *none* of the nation's major railroads currently is revenue-adequate. See *Rail Revenue Adequacy-1982 Determination, Ex Parte No. 450*, at 3 (ICC, Aug. 19, 1983).

[29] See Act of June 18, 1910, ch. 309, § 9, 36 Stat. 548 (current version at Section 10762(e), former version at 49 U.S.C. § 6(9)).

[30] See, *e.g.*, *Charges for Transportation and Disposal of Waste Materials*, 34 I.C.C. 337 (1915) (proposed tariff rejected for failure to include information required by the Act); *Lumber to Texas Ports*, 44 I.C.C. 275, 275-76 (1917) (proposed tariff rejected because of conflict with Commission order).

the tariff filing. *Id.* at 560-61. In connection with this authority, the Commission was "authorized to reject any tariff filed with it . . . not in consonance" with either the tariff filing and publication provision itself or the Commission's tariff regulations. *Id.*

This tariff rejection language, originally set forth in the 1935 Act, is the direct source of the extraordinary authority that the Commission now asserts to nullify tariffs even after they have become effective.[31] However, it is clear that with this tariff language Congress merely provided the ICC with the same rejection power over motor carrier tariffs that it had long exercised over rail carrier tariffs—that is, the power to reject new tariffs summarily, prior to their taking effect, when they suffer some defect so patent as to warrant this administrative short-cut. No revolutionary change in the scope of the Commission's rejection authority was intended.

This conclusion is apparent upon considering the context in which Congress acted. Specifically, when Congress in 1935 legislated the language now set forth in Section 10762(e), the principle that filed and effective tariffs were not to be treated as nullities was well settled and a fundamental element of the existing tariff rate system for rail common carriers. As already shown (pp. 14-15, above), numerous decisions of this Court had held prior to 1935 that an effective tariff rate binds both carriers and shippers, and this Court's decisions also had established that effective tariffs could not be treated as non-existent

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[31] In 1978, the original language of the 1935 Act—which had been extended to railroads in 1940 (see p. 20, below)—was revised and codified in Section 10762(e). See revision notes to 49 U.S.C. § 10762. However, in doing so, Congress made clear that it intended no substantive change, and thus it did not expand or otherwise alter the scope of the rejection power initially conferred in the 1935 Act. See Act of Oct. 17, 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1466. See also *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 319 n. 7 (1981).

even when some procedural or substantive defect was shown to exist.

Against the background of this substantial history and precedent, it is implausible that Congress, in enacting the 1935 Act, would have authorized the ICC to depart from the settled principle concerning the integrity of effective tariff rates, without providing some indication that it intended to do so. Yet, a review of the Motor Carrier Act's legislative history fails to reveal any mention of the tariff rejection authority, much less some indication that Congress intended to confer a new agency power to nullify effective tariffs retroactively.[52] The inference is thus overwhelming that Congress did not intend to grant such extraordinary authority to the Commission—just as in *Arrow Transp. Co.* v. *Southern Ry., supra*, 372 U.S. at 673, this Court concluded that Congress would "not have meant its silence alone to imply" a grant of judicial authority to enjoin carrier rate filings.[53]

Moreover, other aspects of the 1935 Motor Carrier Act confirm this conclusion. First, the 1935 Act also included virtually

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[52] See S. Rep. No. 482, 74th Cong., 1st Sess. (1935); H.R. Rep. No. 1645, 74th Cong., 1st Sess. (1935). Even in providing the Senate with a detailed section-by-section explanation, the Senate sponsor of the Motor Carrier Act of 1935 did not see fit to make any mention whatsoever of the tariff rejection language in which the Commission now finds a sweeping grant of authority to overturn effective tariffs at will. See 79 Cong. Rec. 5656 (1935) (remarks of Senator Wheeler). See also 79 Cong. Rec. 12206 (1935) (remarks of Mr. Sadowski).

[53] The Commission asserts, of course, that the language of Section 10762(e) supports its claimed authority to nullify effective carrier tariffs. Pet. Br. 14-17. But the Eleventh Circuit in an earlier decision carefully analyzed Section 10762(e)'s language and found to the contrary that the "plain meaning" of such language indicates that the ICC's tariff rejection power extends only to "proposed" tariff rates that have not yet become effective. See *Southern Motor Carriers Rate Conf., Inc.* v. *United States, supra*, 676 F.2d at 1377-78. The Commission argues in particular that, by precluding all "use" of a

the same language already set forth in the Interstate Commerce Act, requiring strict adherence to effective tariff rates.[34] It is unlikely, at best, that Congress would simply have repeated this requirement if it had intended to alter the settled principle that effective tariff rates must be observed and to permit Commission nullification of such rates.

Second, the 1935 Motor Carrier Act provided a specific, detailed procedure for challenging the lawfulness of an effective tariff rate.[35] Under this provision, the Commission has authority "after hearing" to determine a tariff rate's lawfulness and to prescribe an appropriate rate if the existing rate is found illegal. This specific and distinct procedure for challenging unlawful tariff rates hardly comports with the Commission's claimed power to overturn common-carrier rates merely by striking effective tariffs.[36]

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rejected tariff (see 49 Stat. 561), "Congress anticipated that some tariffs would be in effect when rejected . . . ." Pet. Br. 17. However, it is apparent that Congress simply intended to make clear that a rejected proposed tariff was not to be employed or applied in any fashion—a view entirely consistent with its own emphasis on respecting a tariff filing once effective.

[34] Compare Act of Aug. 9, 1935, ch. 498, § 227(b), 49 Stat. 561 (current version at Section 10761(a)), with Act of June 29, 1906, ch. 3591, § 2, 34 Stat. 587 (current version at Section 10761(a)).

[35] See Act of Aug. 9, 1935, ch. 498, § 216(e), 49 Stat. 558 (current version at Section 10704).

[36] The Commission attempts to cloud the distinction between the procedure for challenging effective tariffs and the rejection power set forth in Section 10762(e) by stressing that in the present context it will exercise its rejection power with regard to effective tariffs only after a "full hearing." Pet. Br. 8, 12, 33. But this amalgamation of a hearing procedure with the rejection power has no basis in either Section 10762 or any other provision of the Act. The hearing procedure has simply been patched together by the Commission itself in an apparent effort to make its claim of expansive rejection authority more palatable.

Subsequently, in the Transportation Act of 1940, Congress amended the rail-carrier portion of the Interstate Commerce Act to include the same tariff rejection language introduced in the Motor Carrier Act.[37] This change, made as part of a general updating that included many minor revisions, did not enlarge the agency's tariff rejection power. Rather, the committee reports accompanying the 1940 legislation make clear that the language was derived from the 1935 Motor Carrier Act[38] and that it was intended merely to "clarify" the Commission's authority to reject tariff schedules "required to be filed" under the Act.[39] In other words, Congress simply gave explicit recognition in the rail-carrier portion of the Act to the agency's conceded administrative authority to return defective tariff filings before they became effective. Nothing suggests that Congress intended to overturn this Court's established precedents or to permit rejection of common-carrier tariffs *after* they had taken effect.

In sum, Congress has never given the ICC the extraordinary tariff nullification power now claimed. Long in advance of motor-carrier regulation, it was settled that filed and effective tariffs may not be treated as non-existent, whether because of a purported procedural or substantive defect. Congress in no way altered this principle when it made provision for motor-carrier regulation in 1935, nor has it done so subsequently.[40]

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[37] See Transportation Act of 1940, ch. 722, § 8, 54 Stat. 910.

[38] See S. Rep. No. 433, 76th Cong., 1st Sess. 11 (1939).

[39] 86 Cong. Rec. 10167 (1940) (conference report to Transportation Act of 1940).

[40] The Commission now alternatively argues that its authority to nullify effective tariffs should be sustained as a reasonable adjunct to Congress' mandate in the Motor Carrier Act of 1980 that carriers adhere strictly to their approved rate bureau agreements. Pet. Br. 20-25. This argument is based exclusively on a theory of "ancillary power" derived from the Motor Carrier Act (Pet. Br. 21) and is distinct from the Commission's contention that it has authority under

III. Administrative and Judicial Precedent Support the Conclusion That Congress Did Not Intend to Authorize the ICC to Nullify Effective Tariffs.

1. ICC precedents have long recognized that, once a regulated carrier's tariff becomes effective, the Commission has no authority to treat such a tariff as a nullity, whether pursuant to its tariff rejection power or otherwise. This longstanding interpretation deserves significant weight as against the agency's recent *ad hoc* claim of power,[41] for "the want of assertion of power by those who presumably would be alert to exercise it, is . . . significant in determining whether such power was actually conferred."[42]

For example, more than sixty years ago in *Nashville Traffic Bureau* v. *Louisville & N.R.R.*, 53 I.C.C. 37 (1919), an effective tariff rate was attacked as unlawful because the tariff was "published and filed in contravention of [an] outstanding [Commission] order" prescribing a lower maximum rate than was set forth in the tariff. Despite this violation, the Commission recognized that the filed and effective tariff set forth the governing rate for the shipments. Shippers were held entitled to damages, but the rate was not deemed a nullity even though it contravened an express Commission order. See *id.* at 38.

Section 10762(e) to reject effective tariffs. Although the Commission's alternative theory solely concerns motor carriers, it is clear that this claimed ancillary power is equally at odds with the structure of the Act and its bar against private penalties. Further, this theory was not relied upon by the Commission in adopting the rules now at issue.

[41] See, *e.g.*, *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294 (1933); *Bingler* v. *Johnson*, 394 U.S. 741 (1969).

[42] *FTC* v. *Bunte Bros., Inc.*, 312 U.S. 349, 352 (1941) (citation omitted). See also *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513 (1949).

In *Lamb-Fish Lumber Co.* v. *Yazoo & M.V. R.R.*, 42 I.C.C. 470 (1916), the Commission similarly recognized that it could not treat an effective tariff as a nullity, despite the fact that that the tariff set forth incorrect lower rates due to a publication error and the shipper was apparently aware of the error. The Commission stressed that

> "proof of error in publication of rates does not justify departure from the published rates. The fact that shippers may have full knowledge that the rates were published in error cannot alter the plain terms of the law." *Id.* at 471.

The carrier was thus required to treat the published rate as controlling and was not allowed to retain the higher rate intended to be charged.

And in *Acme Peat Products, Ltd.* v. *Akron, C. & Y. R.R.*, 277 I.C.C. 641 (1950), the Commission again rejected claims that published tariff rates should be ignored because they violated an outstanding ICC order. The Commission ruled that "[w]here tariffs are tendered to and accepted by the Commission, the rates therein become applicable, even though technically they should have been rejected upon tender." *Id.* at 644. In the Commission's view, tariff rates, once effective, could not be treated as nullities.[43]

Nashville Traffic Bureau, *Lamb-Fish Lumber*, and *Acme Peat Products* are only a small sample of a long line of Commission decisions recognizing that filed and effective tariffs, even if substantively or procedurally defective, may not be treated as a nullity.[44] The Commission ignores these decisions when it

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[43] See also *Acme Peat Products, Ltd.* v. *Akron, C. & Y.R.R.*, 293 I.C.C. 510, 510-11 (1954).

[44] See, *e.g.*, *Ralston Purina Co.* v. *Atlanta, B. & C.R.R.*, 174 I.C.C. 722, 724 (1931); *Dewey Portland Cement Co.* v. *Atchison, T. & S.F. Ry.*, 185 I.C.C. 233 (1932); *Kansas City Fuel Oil Co.* v. *Atchison, T. & S.F. Ry.*, 210 I.C.C. 134, 136 (1935); *National Pressed Steel Co.* v. *Alabama G.S.R.R.*, 289 I.C.C. 673, 683 (1953); *Phillips Petroleum Co.* v. *Akron, C. & Y.R.R.*, 308 I.C.C. 257, 259-60 (1959); *Shobe, Inc.* v. *Bowman Transp., Inc.*, 350 I.C.C 664, 669-71 (1975).

asserts that it "has long assumed" the authority to reject effective tariff rates and thus impose overcharge liability. Pet. Br. 17. Although the Commission cites cases of its own, almost none involved the retroactive rejection of effective common-carrier tariffs.[45] The only Commission precedent expressing its present view is the 1978 decision in *H.J. Baker & Bros., Inc.—Statute of Limitations*, 357 I.C.C. 640 (1978); and, even in that case, the Commission's statements were dicta since it ultimately awarded damages rather than the far larger "overcharge" liability consistent with its present claim of power.[46] Such recent dicta, "being in conflict" with the ICC's longstand-

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[45] Two of the cases are patently irrelevant. *Conrail Surcharge on Pulpwood*, 362 I.C.C. 740, 755 (1980), did not concern tariff rejection at all; the issue was refund liability under 49 U.S.C. § 10707(d) for a rate surcharge that had been allowed to take effect subject to investigation. Nor, as the Commission now claims (Pet. Br. 17), did *Bell Potato Chip Co.* v. *Aberdeen Truck Line*, 43 I.C.C. 337, 343 (1944), hold that overcharge liability arises when an effective tariff rate is found unlawful; rather, that decision makes clear that damages are the remedy for an unlawful tariff rate. See *id.* at 341-43. As for *Acme Fast Freight, Inc., et al., Common Carrier Application*, 17 M.C.C. 549 (1939), *sustained*, 30 F. Supp. 968 (S.D.N.Y.), *aff'd per curiam*, 309 U.S. 638 (1940), and *Mercer V.R.R.* v. *Pennsylvania R.R.*, 69 I.C.C. 233 (1922), these cases involve jurisdictional decisions in which the Commission struck from its files rate sheets of companies that it found were not common carriers subject to the Act's provisions. In other words, the rate sheets involved were not common-carrier tariffs within the scope of the Act. Thus, striking such rate sheets could not give rise to overcharge liability based on any prior, applicable common-carrier tariffs.

[46] In *H.J. Baker & Bros.*, the ICC held that shippers were entitled to recover only the difference between the rate charged and a lower previously prescribed rate (2%), an amount reflecting actual injury; it did not treat the tariff as a nullity and award the difference between the rate charged and the immediately prior tariff (14%). See 357 I.C.C. at 646. This approach was specifically sustained in *Genstar Chemical Ltd.* v. *ICC*, 665 F.2d 1304 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 905 (1982).

ing construction, are hardly substantial evidence of the proper construction of the Act. Cf. *Watt* v. *Alaska*, 451 U.S. 259, 273 (1981).[47]

The Commission was entirely candid when, in proposing its new tariff symbolization rules, it recognized that its rejection penalty represented "a departure from numerous Commission and court decisions in the past." 44 Fed. Reg. 60123 (1979). The Fifth and Eleventh Circuits have both likewise recognized that the Commission's claimed authority in this case "moves away from an impressive list of prior decisions by the Commission"[48] and disregards "a long line of [prior] cases."[49] Coupled with objections based on the Act's structure, the legislative history and prudential concerns, this departure from past agency precedent is a final sign post that the agency should be reversed.

2. Judicial precedent also undermines the Commission's position. This Court's decisions in *Berwind-White Coal Mining Co.* v. *Chicago & E.R.R.*, *supra*, and *Davis* v. *Portland Seed Co.*, *supra*, clearly holding that an effective common-carrier tariff may not be treated as a nullity (see p. 15, above), have never been modified or limited in any way. Nor has the Court altered its prior decisions (see p. 12, above) emphasizing that damages are based on actual harm and that private penalties are not authorized under the Act. And this Court in *Consolidated Rail Corp.* v. *National Ass'n of Recycling Indus-*

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[47] In one other recent decision cited by the Commission, *National Ass'n of Specialized Carriers, Inc., Agent—Show Cause and Strike Order*, I.C.C. Order No. 36870 (served April 11, 1978), a tariff was declared null and void where tariff subscribers had not been given proper notice of the tariff, contrary to express representations made to the Commission. Because the tariff issuers' error was discovered almost immediately after the tariff took effect, the Commission's action involved no prospect of significant overcharge liability.

[48] *Aberdeen & R.R.R.* v. *United States*, *supra*, 682 F.2d at 1099.

[49] *Southern Motor Carriers Rate Conf., Inc.* v. *United States*, *supra*, 676 F.2d at 1379.

tries, Inc., 449 U.S. 609 (1981), has only recently confirmed its long-held view that the Act's remedies are an integrated whole not lightly to be altered or enlarged by court or agency.[50]

The Commission does attempt to distinguish both *Berwind-White* and *Davis*.[51] But the Commission's strained distinctions simply miss the critical fact here. When Congress in 1935 added a "tariff rejection" provision to the Motor Carrier Act, *Davis*, *Berwind-White* and respect for tariff integrity were settled law and Congress gave no hint that it was changing the law to permit nullification of effective tariffs. If Congress had intended to override Supreme Court decisions on the status of effective tariffs—instead of merely to codify existing agency practice on pre-effective rejection—it is impossible to believe that it would have done so silently.

Furthermore, *Davis* and *Berwind-White* are not ancient and outdated precedents; as recently as 1981, the D.C. Circuit—

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[50] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), cited by the Commission (Pet. Br. 25), affords it no support. In that case, the Court held that a unilateral tariff change by the carrier could not override a previously filed contract permitted as a rate-setting device under the special terms of the Natural Gas Act. Thus, the shipper there was entitled to the lower contract rate not because the agency had any tariff nullification power, as here claimed by the ICC, but because the prior contract was still valid and binding.

[51] Strangely, the Commission purports to distinguish *Berwind-White* on the basis that the alleged tariff filing informalities "were not grounds for invalidation" of an effective tariff. Pet. Br. 29 n.29. That is precisely the railroads' point: a tariff cannot be nullified because of a procedural flaw in the tariff's promulgation after it has gone into effect. As for *Davis*, the Commission says that it involved no issue of the agency's asserted "discretion" to reject an effective tariff. Pet. Br. 28-29. Yet, *Davis* squarely holds that the Act "requires rigid observance of the tariff, without regard to the inherent lawfulness of the rates specified." 264 U.S. at 425.

with the support of the Commission—relied on both cases in holding:

> "The principle in these cases is that where the shipper has been charged no more than the rate reflected in the tariff on file, the remedy for any unlawfulness or irregularity is measured not by looking to some other tariff but by the harm, if any, caused by the unlawfulness or irregularity."[52]

The court emphasized that ICC precedents had repeatly "rejected arguments that a filed tariff should be treated as nonexistent because it was inconsistent with a Commission limiting order . . . ." *Id.*

The D.C. Circuit's decision in *Genstar* was itself preceded by the *Delta Airlines* case, where a different panel of the same circuit held explicitly, with respect to the Federal Aviation Act, that "the Act does not permit rejection, as opposed to investigation, after a tariff becomes effective."[53] Only last year, *Genstar* and *Delta* were followed by the First Circuit in *Providence & Worcester* case[54] and by the Eleventh Circuit in this case,[55] which also cited this Court's decision in *Davis*. Pet. App. 28a. *Genstar*, *Providence & Worcester*, and this case all involved the Interstate Commerce Act, and all are at odds with the Commission's present claim of authority to nullify effective carrier tariffs.

The only substantial support for the Commission's position comes from the 25-year-old decision in *Alouette Peat*.[56] The

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[52] *Genstar Chemical Ltd.* v. *ICC*, *supra*, 655 F.2d at 1308-09.

[53] *Delta Air Lines, Inc.* v. *CAB*, 543 F.2d 247, 268 (1976).

[54] *Providence & W.R.R.* v. *United States*, 666 F.2d 736, 744 (1982).

[55] Pet. App. 28a.

[56] *Chicago, M., St.P. & P. R.R.* v. *Alouette Peat Products, Ltd.*, 253 F.2d 449 (9th Cir. 1958). *Alouette Peat* was cited in *Axinn & Sons Lumber Co.* v. *Long Island R.R.*, 466 F. Supp. 993, 997 (E.D.N.Y. 1978), but that case involved an essentially different problem as to whether a tariff had in fact been authorized for filing by the propo-

artificial and stilted analysis in that case has been rejected by the First Circuit (*Providence & Worcester*), the D.C. Circuit (*Genstar*), and the Eleventh Circuit (this case). Finally, the Commission itself only recently told the D.C. Circuit that *Alouette* was "in error" in treating a flawed rate increase as "void ab initio"[57]—the very nullification power the ICC now asserts for itself in this Court.

Even if the Circuit Court decisions were evenly divided, the controlling decisions are those of this Court. Significantly, the Commission recently cited *Berwind-White* and *Davis* to this Court, as strongly suggesting that "recovery for a tariff's failure to comply with a formal requirement may be limited to the amount of damage suffered by the shipper."[58] This principle, which has guided the treatment of effective tariffs since the passage of the Act, is inconsistent with a tariff nullification power and controls this case.

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nent carriers. And *Alouette Peat* was relied on heavily in *Aberdeen & R.R.R.* v. *United States*, *supra*, 682 F.2d at 1101-02, but that decision is currently before this Court on petitions for certiorari (Nos. 82-707, 82-804).

[57] See joint brief for the Interstate Commerce Commission and the United States, *Genstar Chemical Ltd.* v. *ICC*, No. 80-1170, *et al.*, D.C. Cir., p. 23.

[58] See brief for the federal respondents in opposition, *Nitrochem, Inc.* v. *ICC*, No. 81-1205, U.S. Sup. Ct. p. 6.

CONCLUSION

For the reasons cited, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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November 1983

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